UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

1621 ROUTE 22 WEST OPERATING COMPANY, LLC d/b/a SOMERSET VALLEY REHABILITATION AND NURSING CENTER, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent, and 1199 SEIU UNITED HEALTHCARE WORKERS EAST, NEW JERSEY REGION, Party in Interest.	# 1305294 Case No. 16-3212 Case Nos. 22–CA–069152 and 22–CA–074665 364 NLRB No. 43 (July 13, 2016)

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center hereby petitions this Honorable Court for review of the Decision and Order of the National Labor Relations Board dated July 13, 2016, Case Nos. 22–CA–069152 and 22–CA–074665, 364 NLRB No. 43, a copy of which is attached as Exhibit A.

Respectfully submitted,

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Dated: July 22, 2016

CERTICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2016, I caused true and correct copies of the foregoing Petition for Review to be delivered by Federal Express, addressed to:

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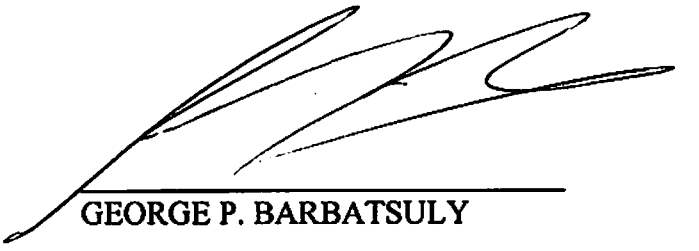

GEORGE P. BARBATSULY

Exhibit

A

1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center *and* 1199 SEIU United Healthcare Workers East, New Jersey Region. Cases 22–CA–069152 and 22–CA–074665

July 13, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On January 15, 2013, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief to each answering brief. The General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the Respondent filed answering briefs to each. In addition, on March 5, 2013, the Respondent filed a motion to stay these proceedings, in response to which the General Counsel filed an opposition;[1] on May 21, 2013, the Respondent submitted a postbriefing letter;[2] and on August 30, 2013, the Respondent filed a motion for the recusal of Chairman Pearce.[3] Most recently, on March 10, 2016, long after the filing period for exceptions in this case had closed, the Respondent filed a motion to dismiss the proceedings, and the General Counsel filed an opposition to that motion.[4]

[1] The Respondent contended that the Board lacked a quorum because the President's recess appointments of two Board members at the time of the motion were constitutionally invalid. In light of the intervening confirmation of the current Board members, we deny the motion as moot.

[2] The Respondent's letter, submitted pursuant to *Reliant Energy*, 339 NLRB 66 (2003), calls the Board's attention to the Third Circuit's opinion in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (2013). We find the Respondent's arguments regarding the authority of the Board to issue the Decision and Certification of Representative on August 26, 2011, moot in light of the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[3] The Respondent argues that Chairman Pearce must recuse himself because his chief counsel, Ellen Dichner, prior to her service as chief counsel, represented the Charging Party Union in this case. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Because the panel does not include Chairman Pearce, and neither he nor Ms. Dichner has participated in the Board's consideration of this case, we deny the motion as moot. See *Somerset Valley Rehabilitation & Nursing Center (Somerset I)*, 362 NLRB No. 113, slip op. at 1 fn. 1 (2015) (incorporating by reference 358 NLRB 1361 (2012)), enfd. sub nom. *1621 Route 22 West Operating Co., LLC v. NLRB*, Nos. 15-2466 & 15-2586, 2016 WL 3146014, at *10 (3d Cir. June 6, 2016).

[4] The Respondent requests that the Board "dismiss the above-captioned unfair labor proceedings in their entirety on the grounds that the complaint and amended complaints in this action were issued by Lafe Solomon, who was serving as Acting General Counsel of the National Labor Relations Board (NLRB or Board) in violation of the Federal Vacancies Reform Act (FVRA)." The Respondent argues that "[a]s the D.C. Circuit found, Solomon was not permitted to serve as Acting General Counsel after the President nominated him in [sic] January 5, 2011," citing *SW General, Inc. v. NLRB*, 796 F.3d 67, 74–75 (D.C. Cir. 2015), petition for rehearing en banc denied Case No. 14-1107 (January 20, 2016), petition for cert. granted __ S.Ct. __, 2016 WL 1381487 (U.S. June 20, 2016) (No. 15-1251). The Respondent adds that the "Court of Appeals for the Ninth Circuit recently reached the same conclusion," citing *Hooks v. Kitsap Tenant Support Services, Inc. (Kitsap II)*, 816 F.3d 550 (9th Cir. 2016). For the reasons discussed below, we find no merit in the Respondent's contentions.

Prior to filing the current motion to dismiss, the Respondent never raised any issue regarding the FVRA or the authority of the Acting General Counsel, and we therefore find that the Respondent has waived the right to do so. See *1621 Route 22 West Operating Co., LLC v. NLRB*, supra, at *9 (quoting *SW General, Inc. v. NLRB*, 796 F.3d at 83). The Board's Rules and Regulations preclude parties from belatedly raising new issues that were not preserved for appeal through the filing of timely exceptions. See Sec 102.46(b)(2) and (g) of the Board's Rules and Regulations ("Any exception . . . not specifically urged shall be deemed to have been waived," and "[n]o matter not included in exceptions . . . may thereafter be urged before the Board, or in any further proceeding."). The judge's decision issued on January 15, 2013, and the Respondent's exceptions were due and filed on March 5, 2013. Inasmuch as the Respondent's 2016 motion to dismiss seeks to overturn the judge's decision based on a newly raised argument, we reject the motion as an untimely effort to file additional exceptions. See *Bloomingdale's, Inc.*, 363 NLRB No. 172, slip op. at 2–3 fn. 4 (2016); *The Boeing Co.*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015).

Moreover, even assuming, arguendo, that we were to consider the Respondent's challenge to the authority of the AGC under the FVRA, we would not find it appropriate to dismiss the complaint. On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3)—the senior agency employee provision. Under that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *Kitsap II*, 816 F.3d at 557; *SW General*, 796 F.3d at 73. The Respondent does not contend otherwise.

We acknowledge that the decisions in *Kitsap II* and *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. *Kitsap II*, 816 F.3d at 558; *SW General*, 796 F.3d at 78. Although that question is still in litigation, we find that subsequent events have rendered moot the Respondent's argument that Solomon's alleged loss of authority after his nomination precludes further litigation in this matter. Specifically, on March 21, 2016, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case that states, in relevant part,

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[5] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[6]

Facts

We include these facts only as a brief overview; the judge's decision below and the Board's decision in *Somerset I*, supra, provide a thorough discussion of the relevant evidence. The Respondent, a 64-bed nursing home in Bound Brook, New Jersey, provides primarily subacute care. It also provides long-term care, but it had no more than five or six patients in long-term care at any relevant time. The Respondent is one of a group of nursing homes owned or managed by two related companies, CareOne Management, Inc. and Healthbridge Management, which operate dozens of nursing homes throughout New Jersey, Connecticut, Massachusetts, and Pennsylvania.[7]

Starting in 2010, the Respondent's nursing staff sought representation by 1199 SEIU United Healthcare Workers East, New Jersey Region (the Union). In response to the employees' vote to unionize, the Respondent committed a series of unfair labor practices, including unlawfully discharging several licensed practical nurses (LPNs).[8] In the unfair labor practice proceedings, the Board found that the Respondent's animus against the Union was "beyond question," as demonstrated by its disparate treatment of union supporters (who were primarily LPNs), repeated unlawful interrogations of employees, solicitations of employee grievances, and other unlawful statements by managers. See *Somerset I*, supra (incorporating by reference 358 NLRB at 1361). The Board further found that the Respondent was extremely focused on unseating the Union through a rerun election, to the extent of making major personnel decisions based on which employees it perceived as likely to "be on [the Respondent's] side" in the event of a rerun election. Id. (incorporating by reference 358 NLRB at 1385). That focus continued even after the Union had been certified as the employees' exclusive representative.

On April 7, 2011, the General Counsel petitioned a United States district court for an injunction ordering interim reinstatement of the nurses who had been discriminatorily discharged, as found in *Somerset I*. In May, the Respondent decided to eliminate its LPN classification and assign all floor nurse work to nonunit regis-

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the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, __ F.3d __, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. Id. at *10.

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in SW General. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by SW General are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. Id. at *9 (citing 5 U.S.C. § 3348(e)(1)).

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting General Counsel following his nomination by the President, in view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot the Respondent's argument that *SW General* and *Kitsap II* preclude further litigation.

Accordingly, the Respondent's motion to dismiss is denied.

[5] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We include in those findings the judge's implicit discrediting of testimony by Danette Manzi, Healthbridge and CareOne executive vice president of operations, regarding her reasons for eliminating the Respondent's LPN position.

The judge found that the Respondent violated Sec. 8(a)(5) by denying the Union access to its facility. Although healthcare employers generally have a valid interest in controlling access to their facility for patient-care purposes, the Respondent did not assert any such interest in response to the Union's request for access or discuss with the Union the possibility of accommodating those interests. Instead, the Respondent simply ignored the Union's request for access. For the reasons stated by the judge and this additional reason, we adopt her finding that the Respondent's denial of access violated Sec. 8(a)(5).

[6] We have modified the recommended Order for the reasons stated below and to conform to our standard remedial language. In accordance with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy and her recommended Order. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[7] The Respondent excepts to the judge's finding that Healthbridge or CareOne owns the Respondent. There is no dispute, however, that the Respondent's administration includes high-level managers employed by Healthbridge or CareOne. Because the complaint names only the Respondent as the employer here, we find it unnecessary to pass on the precise relationship among the three entities.

[8] See *Somerset I*, supra.

tered nurses (RNs).[9] It is undisputed that the Respondent failed to provide the Union with notice and an opportunity to bargain over that decision. The Respondent eliminated the LPNs mainly through attrition but, when only two LPNs, Irene D'Ovidio and Maharanie Mangal, remained, it discharged them. Although the Respondent's Associate Medical Director, Dr. Anthony Frisoli, testified that the change from LPNs to RNs helped convince him to start referring patients to the Respondent, a disinterested witness, Dr. Edward Buch, testified that he stopped referring patients to the Respondent after the change because the brand-new RNs could not provide the level of care that D'Ovidio had provided. No other nursing home affiliated with Healthbridge or CareOne used exclusively RNs as floor nurses.

1. The 8(a)(3) discrimination allegation

We adopt the judge's finding, for the reasons she stated, that the Respondent violated Section 8(a)(3) and (1) by eliminating the LPN position and transferring work to nonunit RNs in retaliation for the LPNs' union activity and to evade its responsibility to reinstate its unlawfully discharged LPNs.[10] As we found in *Somerset I*, the Respondent wished to erode the Union's support to improve its chances of winning a rerun election. Removing the unit classification whose members had led the organizing drive would go a long way towards accomplishing that goal. And, as stated above, the Respondent decided to eliminate the LPN classification just 1 month after the General Counsel sought an injunction ordering the reinstatement of several LPNs. We agree with the judge that this timing supports an inference that the Respondent eliminated the LPN classification in response to the LPNs' union activity, rather than to resolve patient-care problems that had plagued the Respondent for years.[11] The Respondent's brief relies almost solely on challenges to the *Somerset I* decision and on the testimony of Danette Manzi, Healthbridge's or CareOne's Executive Vice President. But the judge implicitly discredited Manzi's testimony, and we have expressly affirmed the judge's credibility findings. We therefore adopt the judge's finding that the Respondent's elimination of the LPN classification and transfer of LPN work to RNs violated Section 8(a)(3).[12]

2. The 8(a)(5) unit scope and unlawful work transfer allegations

The judge found that the Respondent's unilateral decision to eliminate its LPN position and transfer floor nurse work to nonunit RNs violated Section 8(a)(5) of the Act under two theories. First, citing *Fibreboard Corp. v. NLRB*[13] and *Torrington Industries*,[14] she found that the Respondent unlawfully transferred bargaining unit work without providing the Union with notice or an opportunity to bargain. The judge further found that the Respondent's action altered the scope of the bargaining unit: she stated that the elimination of the LPN classification was a mandatory subject of bargaining, and therefore the Respondent violated Section 8(a)(5) by eliminating the classification without notice to or bargaining with the Union.[15] All parties contend that the judge erred in the latter analysis. The General Counsel and the Union contend that, because changing the unit scope is a permissive, not a mandatory, subject of bargaining, the Respondent may not do so absent the Union's consent or a Board order. In contrast, the Respondent contends that its elimination of the LPN position did not violate Section 8(a)(5).

Under Section 8(d) of the Act, mandatory subjects of bargaining include wages, hours, and other terms and conditions of employment. A decision to subcontract or transfer unit work alters the terms and conditions of employment and is therefore a mandatory subject of bargaining. See *Fibreboard Corp.*, 379 U.S. at 210. But eliminating a unit classification alters the scope of the unit, and such an action is a permissive subject of bargaining. See, e.g., *Shell Oil Co.*, 194 NLRB 988, 995 (1972), enfd. sub nom. *OCAW v. NLRB*, 486 F.2d 1266, 1268 (D.C. Cir. 1973). Accordingly, once a specific job has been included in the bargaining unit, it cannot be removed from the unit absent the union's consent or a Board order. *Wackenhut Corp.*, 345 NLRB 850, 852 (2005).

[9] The Respondent contends that it made this change in order to provide better patient care in response to negative recertification surveys that it had received in December 2009 and December 2010 from the New Jersey Department of Health and Senior Services, which regulates nursing homes. The judge rejected this claim.

[10] In her analysis, the judge cited *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), a case decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, supra. Prior to the issuance of *Noel Canning*, however, the United States Court of Appeals for the Eighth Circuit enforced the Board's Order in *Relco Locomotives*, see 734 F 3d 764 (2013), and there is no question regarding the validity of that court's judgment.

[11] See also *1621 Route 22 West Operating Co. v. NLRB*, supra, at *12 (rejecting the Respondent's similar assertion of the motivation for its conduct in *Somerset I*).

[12] As alleged in the complaint and found by the judge, the Respondent's decision resulted in the discharge of LPNs D'Ovidio and Mangal. To fully remedy this violation, the judge properly ordered the Respondent to offer D'Ovidio and Mangal full reinstatement and to make them whole for losses resulting from their discharges.

[13] 379 U.S. 203 (1964).

[14] 307 NLRB 809 (1992).

[15] See generally *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

The Respondent admits that it eliminated the LPN classification but contends that, "regardless of whether the elimination of the LPN classification was a mandatory or permissive subject of bargaining, no relief is warranted here." The Respondent does not state a position about whether the elimination of the LPN classification is a change in the scope of the unit, a transfer of work outside the unit, or both. Instead, it simply raises several defenses to the general duty to bargain that the Board and courts have recognized in cases including *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), and *Dubuque Packing, Co.*, 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994).[16] As we now show, those defenses are inapplicable here, as well as unsupported by the record.[17]

First, the cases cited above concern refusals to bargain over mandatory subjects of bargaining. The Board has never found an exception to an employer's duty to refrain from unilaterally changing the scope of a unit—again, a permissive subject of bargaining—based on defenses recognized in cases dealing with mandatory bargaining subjects. Essentially, the Respondent argues that it may make sweeping changes to its employees' representation not only without obtaining the Union's consent, but without even notifying the Union in advance. The Respondent has not offered any rationale for applying such ill-suited defenses here, and we decline to do so. Second, unlike in all the cases that the Respondent cites, employees of the Respondent indisputably still perform all the work that the employees in the eliminated LPN classification performed at the same location.[18] Finally, even if the defenses the Respondent raises were cognizable here, we affirm the judge's reasons for rejecting them on the merits.

The Respondent also challenges the General Counsel's request for an order that it cease and desist from removing classifications from the unit without the Union's consent, contending that the General Counsel did not seek that remedy in the complaint and citing *TLI, Inc.*[19] But *TLI, Inc.* is inapposite because the complaint in the present case clearly alleges that the Respondent violated Section 8(a)(5) by removing the LPN classification from the unit. An order to restore the classification and to cease and desist from removing classifications from the bargaining unit, absent the Union's consent or a Board order, is the standard remedy for the violation alleged and found, and it need not be separately requested. In any event, the Board's power to address remedial issues is not limited to granting the remedies sought by the General Counsel, in the complaint or otherwise. See, e.g., *J. Picini Flooring*, 356 NLRB 11, 12 fn. 5 (2010) (rejecting the argument that a requested remedy had been waived because it was sought for the first time on exceptions); *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996) (citations omitted).

We agree with the General Counsel and the Union that the scope of the bargaining unit may be altered only by consent of the parties or Board order. Therefore, ordering the Respondent merely to give the Union notice and an opportunity to bargain before implementing any changes to the scope of the unit would not fully remedy the violation found. Instead, we shall order the Respondent to cease and desist from altering the bargaining unit without the Union's consent.[20]

3. Remedial matters

The Board has broad discretionary authority under Section 10(c) to fashion appropriate remedies that will

[16] In particular, the Respondent argues that eliminating the LPNs was a change in the scope and direction of the business, that labor costs were not a factor in the decision, and that the decision was motivated by "compelling economic circumstances."

[17] The Board has unanimously found that the Respondent violated Sec. 8(a)(3) when it eliminated the LPN classification and transferred LPN work to RNs. Because any additional finding that these same acts also violated Sec. 8(a)(5) would not materially affect the remedy, Member Miscimarra finds it unnecessary to reach or pass on the Sec. 8(a)(5) issues addressed by his colleagues.

[18] The Respondent admits as much in its brief, but it draws the wrong conclusion from this admission. In the Respondent's view, this case should be distinguished from *Fibreboard* because, here, the Respondent did not hire permanent subcontractors to do the work that LPNs had previously done. This fact undermines the Respondent's contention. The entire line of Board and court cases beginning with *Fibreboard*, including *First National Maintenance* and *Dubuque Packing*, deals with transfers of work in which the employer moves the work to employees of a *different* employer or its own employees at a *different* location. A straightforward work reassignment to another (in this case, nonrepresented) group of employees at the same location is not contemplated by those cases.

[19] 271 NLRB 798, 805–806 (1984), enfd. 772 F.2d 894 (3d Cir. 1985).

[20] We need not address whether, as the judge found, the Respondent's elimination of the LPN classification was also a unilateral transfer of unit work in violation of Sec. 8(a)(5). The remedy for such a violation would essentially be subsumed by the remedies we order for the 8(a)(3) violation and the 8(a)(5) change of unit scope without consent. *Aggregate Industries v. NLRB*, __ F.3d ___, Cases No. 14-1252 and 14-1276, 2016 WL 3213001 (D.C. Cir. June 10, 2016) (denying enforcement in relevant part to 359 NLRB No. 156 (2013)) does not require a different result. There, the court held that the Board had erred in finding a change in the unit's scope, rather than a transfer of work, when the employer moved a portion of its work from the employees in one bargaining unit to those in another unit. In so finding, the court nonetheless distinguished cases in which "the employers did not simply move work between positions in different units; they effectively eliminated the position that had initially done the work." Id. at *6. Here, the Respondent effectively—and purposefully—eliminated the LPN position that had performed the work at issue before the Union prevailed in the election.

best effectuate the policies of the Act. See, e.g., *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, slip op. at 1 (2015) (citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969)); see also *1621 Route 22 West Operating Co., LLC v. NLRB*, supra, 2016 WL 3146014, at *11 (enforcing *Somerset I*) ("[C]ourts of appeals should not substitute their judgment for that of the NLRB in determining how best to undo the effects of unfair labor practices, and the Board's choice of a remedy must be given special respect by reviewing courts, and must not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.") (internal quotation marks and citations omitted). Consistent with that discretionary authority, we have concluded that, in this case, remedies beyond those recommended by the judge are necessary to effectuate the policies of the Act. As stated, the Board's power to address remedial issues sua sponte is well established.

In light of the Respondent's demonstrated proclivity to violate the Act, we will issue a broad remedial order requiring it to cease and desist from "in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act." Such broad orders are appropriate where the respondent has shown a proclivity to violate the Act or has committed particularly egregious violations. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Although no party excepted to the judge's failure to recommend a broad order, the Respondent's violations are sufficiently numerous and serious to warrant a broad order.

The Respondent has repeatedly violated the Act. In *Somerset I*, we found that the Respondent violated Section 8(a)(1) by engaging in multiple unlawful interrogations and unlawful solicitations of employee grievances, and Section 8(a)(3) and (1) by unlawfully disciplining and discharging four employees, accelerating the resignation date of a fifth, and reducing the hours of per diem employees, all in response to the Union's organizing drive. Now, the Respondent has taken its actions a step further, violating Section 8(a)(5), (3), and (1) by eliminating the LPN classification in retaliation for the union activities of its LPNs and in order to avoid reinstating unlawfully discharged employees.[21] Its unlawful actions have seriously depleted the size and strength of the bargaining unit.[22] The Respondent has also independently violated Section 8(a)(5) and (1) by refusing to allow its employees' chosen bargaining representative any access to its premises, failing even to respond to the Union's request. Therefore, in light of the Respondent's demonstrated proclivity to violate the Act, we amend the judge's remedy to include a broad cease-and-desist order.

Because of the Respondent's proclivity for violating the Act and its undermining of the bargaining unit, we find that further remedies are appropriate. To dissipate as much as possible any lingering effect of the Respondent's serious and widespread unfair labor practices and enable employees to exercise their Section 7 rights free of coercion, we will require that the remedial notice be read aloud to the Respondent's employees by a responsible management official of the Respondent, and in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union. See, e.g., *Texas Super Foods, Inc.*, 303 NLRB 209, 220 (1991).

Finally, we will require that the remedial notice should be mailed, at the Respondent's expense, to all the Respondent's employees employed at any time since May 1, 2011 (the date of the first unfair labor practice by the Respondent in these proceedings). We find that the Respondent's persistent goal of undermining the Union, the length of time that has passed since the events of this case, and especially the LPNs' absence from the work force during that time, warrant this additional notification remedy. See *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 6–7 (2014) (noting that "the [r]espondents' violations were unquestionably deliberate, targeted, and egregious, designed to frustrate the exercise of Section 7 rights and undermine the [u]nion's effectiveness. Mailings will reach individuals who would not otherwise see the posting but who were affected by the [r]espondents' unlawful conduct, such as the [r]espondents' former employees who lack access to the [r]espondents' facility."), enfd. in relevant part sub nom. *HTH Corp. v. NLRB*, — F.3d —, Case No. 14-1222, 2016 WL 2941936 (D.C. Cir. May 20, 2016).[23]

[21] We also note that some of the Respondent's agents who committed the unfair labor practices here, including Manzi, are employees of Healthbridge, which has shown a proclivity to violate the Act. See *Long Ridge of Stamford*, 362 NLRB No. 33 (2015); *Healthbridge Mgmt.*, 360 NLRB No. 118 (2013), enfd. 798 F.3d 1059 (D.C. Cir. 2015). Although Healthbridge's ownership of the Respondent is disputed, its employees' participation in the conduct that we find unlawful is not.

[22] Before the Respondent eliminated the LPN classification, it employed 19 LPNs, about a quarter of the total bargaining unit of about 75 employees.

[23] Member Miscimarra would not order the Respondent to mail the notice to employees absent a showing that the Respondent has gone out of business or closed the facility involved in these proceedings. In his view, unlike in *Pacific Beach Hotel*, cited by his colleagues, the length of time during which the Respondent has undermined the bargaining unit has not been so excessive and unusual as to warrant a notice mailing.

ORDER

The National Labor Relations Board orders that the Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating classifications contained in the bargaining unit represented by the Union and transferring the work formerly performed by employees in those classifications to nonunit employees in retaliation for the bargaining unit employees' union activities. The bargaining unit is:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

(b) Eliminating classifications contained in the bargaining unit without the consent of the Union or a Board order.

(c) Refusing to provide the Union access to its Bound Brook, New Jersey facility to obtain information regarding the bargaining unit employees' work processes and working conditions, including health and safety conditions.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, restore the LPN classification and return to the LPNs any LPN work transferred to RNs since May 2011.

(b) On the Union's request, grant the Union's designated representative access to the Bound Brook, New Jersey facility for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe the bargaining unit employees' work processes and working conditions, including health and safety conditions.

(c) Within 14 days from the date of this Order, offer Irene D'Ovidio and Maharanie Mangal full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Irene D'Ovidio and Maharanie Mangal whole, with interest, for any lost earnings and other benefits suffered as a result of the above-described unlawful unilateral and retaliatory changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Irene D'Ovidio and Maharanie Mangal for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or by Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(f) Within 14 days from the date of this Order, remove from its files any reference to the August 18, 2011 and October 17, 2011 unlawful discharges of Irene D'Ovidio and Maharanie Mangal, and, within 3 days thereafter, notify D'Ovidio and Mangal in writing that this has been done and that the discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Bound Brook, New Jersey facility copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by Respondent's authorized representative, copies of the attached notice to the last known addresses of all current employees and former unit employees employed by the Respondent at any time since May 1, 2011.

(j) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice is to be read to employees by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 13, 2016

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT eliminate classifications contained in the bargaining unit represented by the Union and transfer the work formerly performed by employees in those classifications to nonunit employees in retaliation for your union activities. The bargaining unit is:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

WE WILL NOT eliminate classifications contained in the bargaining unit without the Union's consent or a Board order.

WE WILL NOT refuse to provide the Union access to our Bound Brook, New Jersey facility to obtain information about your work processes and working conditions, including health and safety conditions.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, restore the LPN classification and return to the LPNs any LPN work transferred to RNs since May 2011.

WE WILL, on the Union's request, grant the Union's designated representative access to our Bound Brook, New Jersey facility for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe your work processes and working conditions, including health and safety conditions.

WE WILL, within 14 days from the date of the Board's Order, offer Irene D'Ovidio and Maharanie Mangal full reinstatement to their former jobs or, if those jobs no

longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Irene D'Ovidio and Maharanie Mangal whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL compensate Irene D'Ovidio and Maharanie Mangal for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or by Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Irene D'Ovidio and Maharanie Mangal, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or by a Board agent in the presence of a responsible management official and, if the Union so desires, of an agent of the Union.

1621 ROUTE 22 WEST OPERATING COMPANY, LLC, D/B/A SOMERSET VALLEY REHABILITATION & NURSING CENTER

The Board's decision can be found at www.nlrb.gov/case/22-CA-069152 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Nancy Slahetka, Esq., for the Acting General Counsel.
Steven W. Likens, Esq. and *Amber Isom-Thompson, Esq.* (*Littler Mendelson, P.C.*), for the Respondent.
Ellen Dichner, Esq. (*Gladstein, Reif & Meginniss, LLP*), for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 22–CA–69152 filed on November 17, 2011, and amended on or about December 5, 2011, January 25, 2012, and April 3, 2012, and upon a charge in Case 22–CA–74665 filed on February 15, 2012, an Order consolidating cases, third amended consolidated complaint, and notice of hearing issued on April 26, 2012. The complaint alleges that 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center ("Somerset Valley" or "Respondent"), violated Sections 8(a)(1), (3), and (5) of the Act by eliminating a bargaining unit classification and transferring work to nonbargaining unit classifications without providing 1199 SEIU United Healthcare Workers East, New Jersey Region (1199 or the Union), with notice or the opportunity to bargain, and in retaliation for the bargaining unit employees' union activities. The complaint further alleges that as a result of the unlawful elimination of a bargaining unit classification and transfer of work, Respondent discharged employees Irene D'Ovidio and Maharanie Mangal. Finally, the complaint alleges that Somerset Valley unlawfully denied the Union access to its facility, in violation of Sections 8(a)(1) and (5). Respondent filed an answer denying the material allegations of the complaint.

This case was tried before me on May 7, 8, 9, 10, and 11, 2012, in Newark, New Jersey.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits in its answer and I find that at all material times it has been a limited liability company engaged in the business of operating a rehabilitation and nursing facility in Bound Brook, New Jersey, which provides health care and related services. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations and Management

Respondent operates a 64-bed facility which provides primarily sub-acute health care for illness, injury, or exacerbation of a chronic condition immediately after or in lieu of hospitalization. Respondent also has several long-term care patients, who have resided at its facility for a number of years. These long-term care patients generally require assistance with activities of daily living. Respondent is subject to regulation and oversight by the New Jersey Department of Health and Senior

Services (the "NJDHSS"), which performs yearly Recertification Surveys based upon visits to the facility, and by the Center for Medicare and Medicaid Services (the "CMS"). At all times material to the events at issue here, Respondent accepted self-paying and Medicare patients, but not Medicaid patients.

Respondent is part of a group of health care facilities owned and operated by Healthbridge Management, Inc. and CareOne Management, Inc. Healthbridge Management operates three skilled nursing facilities in New Jersey Somerset Valley, Woodcrest, and South Jersey. CareOne Management operates 25 facilities in New Jersey which also provide 24-hour skilled nursing services for both sub-acute and long-term care patients. Healthbridge Management and CareOne Management both maintain their corporate offices and an information technology department at Bridge Plaza in Fort Lee, New Jersey. Healthbridge Management and CareOne Management issue policies applicable to the individual facilities they own and manage.

Respondent's administrator is the manager with the highest level of authority at the Somerset Valley facility. Since August 1, 2011, this position has been held by Kristina Grasso, and from August 2010 to August 2011 Respondent's administrator was Doreen Illis.[1] Respondent's administrator reports to a regional director of operations, who is employed by either Healthbridge Management, Inc. or CareOne Management, Inc. Jason Hutchens was the regional director of operations until November 2011, and in January 2012, Orrin Karstetter assumed this position. The egional director of operations in turn reports to the executive vice president of operations, who is employed by both Healthbridge Management and CareOne Management. The executive vice president of operations has ultimate operational control over HealthBridge Management facilities such as Respondent, and CareOne Management facilities as well. Danette Manzi has been executive vice president of operations for HealthBridge Management and Care One Management since January 2011.

Somerset Valley's Nursing Department is headed by a director of nursing (DON), who reports to its administrator. There is also an assistant director of nursing (ADON), and a unit manager in the Nursing Department. These positions have seen significant turnover during the past several years. Doreen Illis testified that when she became administrator in August 2010, the DON position had been filled by an employee from Healthbridge Management or CareOne Management. Illis then hired Inez Konjoh as the DON, but discharged her 5 months later. Subsequently Jackie Engram, vice president of clinical services in New Jersey for either HealthBridge Management or CareOne Management, became DON. Kristina Grasso testified that when she became administrator in August 2011, Engram was still the DON, but left shortly thereafter. Ruth Brown Roper was then hired as the DON, but she was discharged by Grasso in late October or early November 2011. Grasso then promoted ADON Jennifer Lempke to interim DON from November 2011, until Lempke resigned in late April 2012.

[1] Illis and Grasso worked together at the facility for 2 to 3 weeks in August 2011.

Similarly, Illis testified that Francine O'Dominique was the ADON from either October or November 2010 until August 2011. When Grasso became administrator, Lempke was apparently the ADON, and after Grasso promoted Lempke to interim DON, Ajoke Ogunwolere assumed the ADON position. Illis and Grasso also both testified that there had been at least three different employees in the unit manager position during their respective tenures as administrator.

Kristina Grasso, Doreen Illis, and Danette Manzi testified at the hearing for Respondent, as did Anthony Frisoli, MD, Respondent's associate medical director since November 2011. Maharanie Mangal and Irene D'Ovidio, both formerly employed by Respondent as LPNs, testified for General Counsel, as did Edward Buch, MD, formerly an attending physician at Respondent's facility, and Ricky Elliott, a vice president of 1199.

Grasso and Dr. Frisoli testified regarding impending regulatory changes in conjunction with the recently enacted federal healthcare reform measures. Under these new rules, if a patient with a diagnosis of congestive heart failure, pneumonia, or myocardial infarction is readmitted to a hospital within 30 days of discharge, the hospital will incur a financial penalty. Hospitals are therefore seeking out facilities for sub-acute care referrals with lower hospital readmission rates, and facilities which provide sub-acute care, such as Respondent, are in turn attempting to decrease the rates at which their patients are readmitted to a hospital. Healthbridge Management and CareOne Management had therefore issued to their facilities, and Respondent was to implement, a series of measures designed to reduce the rate at which patients who are referred by hospitals to Respondent are readmitted to a hospital within thirty days, such as the Acute Transfer Alternative Program, or ATAP. Illis testified that during her tenure as administrator, she and Engram participated in a weekly conference call with Jeff Slocum, a manager with Healthbridge Management responsible for quality assurance,[2] regarding patients transferred from Somerset Valley to a hospital. Illis testified that other facilities participated in conference calls with Slocum before and after hers.

B. The Union's Organizing Campaign, the Representation Election, and the Union's Certification

On July 22, 2010, 1199 filed a petition for a representation election in Case 22–RC–13139. The election was conducted on September 2, 2010, pursuant to a Stipulated Election Agreement, and 38 votes were cast for 1199, with 28 votes cast against the Union and five challenged ballots. Respondent filed Objections, and in a Decision issued August 26, 2011, the Board adopted the Hearing Officer's findings and recommendations overruling Respondent's objections, and certified 1199 as the exclusive collective bargaining representative of the employees in the following unit:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation

[2] Illis apparently could not provide specific information regarding Slocum's title or employer during her testimony (Tr. 493–495).

assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

Somerset Valley Rehabilitation & Nursing Center, 357 NLRB 736. Respondent subsequently refused to bargain with 1199 and provide requested information, and on December 30, 2011, the Board issued a Decision and Order requiring that Respondent do so. *Somerset Valley Rehabilitation & Nursing Center*, 357 NLRB 1866. Respondent has filed a Petition for Review of the Board's August 26, 2011 Decision and Order with the United States Court of Appeals for the Third Circuit.

C. Other Previous Unfair Labor Practice Charges and Federal Litigation

Beginning on August 31, 2010, 1199 filed a series of unfair labor practice charges and amended charges alleging that Respondent had issued written warnings to employees, discharged them, and reduced their hours in retaliation for their activities on behalf of the Union. The charges also alleged that Respondent unlawfully interrogated employees and solicited employee grievances. A hearing was conducted from April 27 to June 28, 2011 before Administrative Law Judge Steven Davis, and on November 21, 2011, Judge Davis issued a Decision and Recommended Order. *Somerset Valley Rehabilitation & Nursing Center*, JD(NY)–45–11. Respondent filed Exceptions, and on September 26, 2012 the Board issued a Decision and Order in *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361. The Board affirmed Judge Davis's conclusions that Respondent had violated Sections 8(a)(1) and (3) by unlawfully issuing written discipline to and discharging employees Shannon Napolitano, Jillian Jacques, and Valerie Wells, by discharging Sheena Claudio, by accelerating the resignation date of Lynette Tyler, and by reducing the hours of per diem employees.[3] The Board also affirmed Judge Davis's findings that Respondent violated Section 8(a)(1) by repeatedly interrogating employees in an unlawful manner, and by unlawfully soliciting employee complaints and grievances.

In April 2011, prior to the opening of the administrative hearing, the Regional Director, Region 22, filed an action seeking injunctive relief pursuant to Section 10(j) of the Act in the United States District Court for the District of New Jersey. On April 16, 2012, the District Court issued a memorandum opinion and order granting and denying in part the relief sought. The District Court order enjoined and restrained Respondent from interrogating employees, promising increased benefits, and improved terms and conditions of employment if employees refrained from union activities, and discharging and disciplining employees in retaliation for their union support and activities. The District Court further ordered the reinstatement of Napolitano and Claudio. However, the District Court declined to order the reinstatement of Wells and Jacques, rescind written discipline, and restore the hours of the per diems. *Lightner v. Somerset Valley Rehabilitation & Nursing Center*, 2012 WL 1344731 and 2012 WL 1372177 (D.N.J. April 16, 2012).

D. Respondent's Elimination of the LPN Job Classification and Move to an All-RN Model of Health Care Delivery

At all times material to the events at issue in this case, Respondent's nursing staff has been assigned to three shifts. Prior to the spring of 2011, there were three floor nurses and four to five CNAs on the 7 a.m. to 3 p.m. shift, three floor nurses and three to four CNAs on the 3 p.m. to 11 p.m. shift, and two floor nurses on the 11 p.m. to 7 a.m. shift. These shifts overlapped by 15 minutes, so that the nursing staff finishing one shift could consult with the staff beginning the following shift. LPNs worked as floor nurses, as did three RNs; both classifications of employees performed the same tasks.[4] Illis testified that during this period Respondent employed 19 LPNs and eight RNs, including part-time and per diem LPNs. Each LPN was responsible for approximately 2022 patients or residents each day.

Mangal and D'Ovidio testified regarding the daily activities of the floor nurses. After receiving a report from the floor nurse on the prior shift, the LPNs distributed medication and performed treatments and assessments, involving a physician as necessary. Treatments included those necessary for the care of wounds (such as suctioning and changing bandages and dressings) and tracheotomies (such as suctioning and cannula clearance), treatments for infections, starting and maintaining IV lines,[5] treatments involving respiration such as nebulizers, inhalers, and BIPAP and CPAP machines, the use of continuous passive motion machines, maintenance of correct posture, and tasks involved in peritoneal dialysis. In addition, LPNs assisted chronic heart failure and other patients with activities of daily living ("ADLs").

LPNs and RNs also performed assessments. In the admissions process, LPNs performed an assessment regarding the patient's pain, wounds, sensory perception, alertness and consciousness, and capabilities in terms of standing and performing ADLs independently. A group of employees, including the Minimum Data Set ("MDS") Coordinator, the dietician, social worker, therapeutic recreation, and other nurses, then developed a comprehensive plan of care for the patient or resident. LPNs also performed specific assessments for pain while distributing medications, and assessed each patient when beginning their shift each day. Under their professional license, RNs are permitted to develop a plan of care for the patient based upon the assessments they perform, whereas an LPN's assess-

[3] Napolitano, Jacques, and Claudio were LPNs, Wells, Tyler, and the per diem employees at issue in that case were CNAs. Judge Davis found that Napolitano, Jacques, and Claudio were "the three leading union advocates at Somerset Valley." *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 387.

[4] In addition, the unit manager, assistant director of nursing, director of nursing, and MDS coordinator are RNs.

[5] Only RNs are permitted under their license to administer a bolus or "IV push" medication through an IV line, as opposed to medication administered via an IV pump.

ment involves only observing and recording various aspects of the patient's condition. Finally, only RNs are permitted to make a pronouncement of death.

Mangal and D'Ovidio testified that beginning in June 2011, Respondent began using a number of RNs referred from an agency to replace LPNs as the LPNs resigned or were discharged. D'Ovidio testified that Respondent had never before used agency nurses in such a large capacity. Mangal and D'Ovidio both testified that they trained the agency RNs to perform specific floor nurse tasks, such as passing medication, starting an IV, dialysis procedures, and suctioning, because several had little or no actual nursing experience.[6] The agency RNs then proceeded to perform the same work that LPNs had performed as floor nurses, described above.

Eventually these agency RNs were replaced by RNs who were hired as floor nurses on a permanent basis, and by July 2011, Mangal and D'Ovidio were the only LPNs remaining at the facility. Mangal and D'Ovidio testified that they provided orientation and training to the newly-hired RNs, some of whom had no nursing experience. For example, Mangal and D'Ovidio testified that they trained the new employee RNs regarding starting an IV, dialysis, pleural evacuation, wound and tracheotomy suctioning, and changing wound dressings. The evidence establishes that none of the RNs initially hired by Respondent are still employed at the facility except for one, who at the time of the hearing was suspended and on a final warning for permitting a patient to go outside the facility in order to smoke a cigarette, providing them with cigarettes and a lighter, in violation of Respondent's policies.[7]

Dr. Edward Buch, a general and vascular surgeon who had provided wound care at Somerset Valley from about the spring of 2010 until the fall of 2011, testified regarding the impact of the transition from LPNs to RNs on patient care. Dr. Buch testified that his practice at Somerset Valley focused on wound care, including bed sores, leg wounds, and surgical wounds, and that he visited the facility once a week. Dr. Buch testified that he ended his relationship with Respondent because the care he was able to provide began deteriorating when D'Ovidio was removed from her wound care duties and replaced with other nurses who did not share her expertise. According to Dr. Buch, eventually there were nurses assigned to his wound care patients who had no clinical experience with major wounds or dressings at all. Dr. Buch testified that he communicated his dissatisfaction with the lack of trained nurses and its impact on care to two different directors, to no avail, and eventually ended his association with Respondent and stopped referring patients there. Dr. Buch testified that in his opinion, in the context of Respondent's patient population and the care being provided, a nurse's professional qualification was irrelevant in light of their practical experience and knowledge of the particular patient.

[6] Illis testified that the LPNs were not instructed to train the RNs, only to provide an orientation to the facility and patients, but also stated that she had no personal knowledge of what actually occurred during the initial interactions between the LPNs and the agency RNs. All of the agency RNs Mangal and D'Ovidio referred to during their testimony are no longer employed at the facility.

[7] The evidence also establishes that this RN had been disciplined previously for eight medication errors.

E. The Discharge of Irene D'Ovidio and Maharanie Mangal

D'Ovidio and Mangal had both been employed by Respondent for a number of years. Mangal worked as a CNA for 7 years before becoming an LPN in May of 2009, and worked as a floor nurse until her discharge on November 17, 2011. D'Ovidio began her employment with Respondent as an LPN floor nurse in August 2002, and was employed as a nurse until her discharge on August 18, 2011. D'Ovidio also had specific duties as a wound care nurse and MDS assistant, in conjunction with the special wound care program directed by Dr. Buch. These duties ended in January 2011, at which point D'Ovidio returned to her floor nurse position.

D'Ovidio testified that on August 18, 2011, she noticed when arriving at work that an extra nurse had been assigned to the day shift. Soon after she had arrived, Grasso called her into the office, and Illis was also present. Illis told D'Ovidio that the facility was moving in a different direction, and that D'Ovidio "wasn't part of the plan." Illis told D'Ovidio to hand in her keys and badge, and said that D'Ovidio could not return to or call the facility again.[8]

Mangal had a number of conversations with Respondent's managers regarding the elimination of the LPN positions and transition to an all-RN model of care prior to her discharge. Mangal testified that some time during August 2011, she spoke to Ruth Roper Brown, who was then the DON, about a friend who was interested in working for Respondent. Roper Brown asked whether Mangal's friend was an LPN or an RN, and told Mangal that Respondent was only hiring RNs with a Bachelor of Arts degree. Later that month, Grasso called Mangal to her office, and told Mangal that there were only two LPNs still employed at Somerset Valley. Grasso told Mangal that in order to remain employed she would have to enroll in an RN program as soon as possible. Mangal responded that she was interested in becoming an RN and would investigate the programs available. Grasso testified that during this conversation she told Mangal that Mangal needed to enroll in an RN program for the fall semester in order to remain employed. Illis testified that she also spoke with Mangal prior to leaving the Administrator position in August 2011, and was under the impression that Mangal had enrolled in an RN program. Illis testified that she discussed the issue with Engram, Grasso, and Hutchens.

After her discussion with Grasso, Mangal began contacting educational institutions to obtain information about RN programs. Mangal was told that it was too late at that point to enroll for the fall semester, but she would be able to enroll to begin the coursework the following spring. Mangal also discovered that she would be required to complete a number of prerequisite courses when beginning the degree program.[9]

[8] The evidence establishes that D'Ovidio received a verbal warning in early spring 2011 for failing to provide documents in a timely manner, specifically a summary of wound care treatments that she had already performed. Although D'Ovidio prepared and submitted this summary on a daily basis, it was not a part of any patient's official medical record. In any event, the evidence does not establish that this verbal warning played any role in D'Ovidio's discharge.

[9] D'Ovidio testified that she is currently enrolled in a program to obtain an Associate's Degree and become an RN. D'Ovidio testified that

Mangal testified that toward the end of August 2011, Roper Brown asked whether she was enrolled in an RN program, and Mangal explained that it was too late for her to enroll for the fall semester, that she would have to enroll for the spring, beginning with the prerequisite courses. Mangal testified that during the first week of October 2011, Roper Brown provided her with a card containing information about a college network for an RN program. Mangal investigated this program, but found that its cost was prohibitive, and felt that she would be more successful with a live teaching format, as opposed to classes conducted electronically. Grasso testified that she was not aware of these impediments to Mangal's enrolling in the college network RN program.

Mangal testified that approximately 2 weeks prior to her discharge, she spoke to Hutchens while distributing medications on the floor. Hutchens asked Mangal whether she was enrolled in an RN program, and Mangal told him that it was too late to enroll for the fall semester, but she intended to enroll to begin in the spring. On October 17, 2011, Grasso called Mangal into her office. Grasso told Mangal that she was "the last one standing," and that she would have to let Mangal go if Mangal had no proof that she was enrolled in an RN program. Mangal testified that she tried to explain that she intended to enroll for the spring semester, but eventually asked Grasso whether she was firing her. Grasso said that she was discharging her because she had no proof of her enrollment in an RN program. The Termination Personnel Action Form Grasso signed that day states that Mangal was discharged because she had not enrolled in an RN program.

F. Respondent's Decision to Eliminate the LPN Classification and Move to an All-RN Model

Danette Manzi, executive vice president of operations for both Healthbridge Management and CareOne Management, testified that in May 2011 she made the determination to eliminate the LPN job classification at Somerset Valley, and to have RNs perform the floor nurse work formerly performed by the LPNs. Manzi testified that she made this decision after discussions with Hutchens, who was concerned that Somerset Valley was providing services similar to its competitors, and that all of the competing facilities were accepting the same types of patients. Manzi testified that in Hutchens's opinion Somerset Valley needed to provide a unique service in relation to competitor businesses. Manzi and Hutchens therefore decided to, as she put it, "go all sub-acute." Manzi testified that she believed that only RNs could effectively provide the level of care required by a population of sub-acute patients, because only RNs had the assessment skills necessary to adequately address the various medical issues involved.

Manzi testified that her decision to eliminate the LPN classification was also based upon "concerns" she and Hutchens shared regarding the standard of care the LPNs were providing, given the number of citations and deficiencies noted in the December 2010 Recertification Survey performed by the NJDHSS.[10] Manzi stated that Hutchens reported to her that some of the systems for patient care delivery at Somerset Valley, in particular medication administration, were not "sustainable" with LPNs. According to Manzi, Hutchens informed her that despite teaching, training, and mentoring that Respondent had implemented, the quality of care being provided by the LPNs had not risen to an acceptable level.[11]

The record indicates that Hutchens received his information regarding the standard of care being provided and attempts to remedy the issues revealed in the NJDHSS surveys from Illis, who at that time was Respondent's administrator. Illis testified that a week or two after arriving at Somerset Valley in August 2010 she determined that the LPNs were not capable of providing adequate care for patients at the acuity level of the facility's population, based upon the findings of the NJDHSS December 2009 Recertification Survey.[12] Illis testified that she initially reached this conclusion after her first month at Somerset Valley, or in September 2010. Illis testified that she and Hutchens spoke at least once each week, and that it would be unusual if she had not informed Hutchens of this conclusion at that time. Illis testified that she subsequently attempted to remedy the problems and improve the standard of care through education and subsequently discipline.

After the December 2010 Survey revealed a significant number of deficiencies, Illis met with the staff on about five to seven occasions to discuss the Survey's results. During these meetings, Illis told the staff that failure to administer medications, failure to act in accordance with to resident rights, and failure to follow nursing policy and professional standards of care would be subject to disciplinary action.[13] Illis testified that despite these meetings she still noticed problems involving wound care, IV care, medication management issues, and the overall standard of care being provided. She therefore concluded that the nursing staff was not capable of providing the level of care that the residents or patients required.

Manzi testified that in May 2011 she told Hutchens that as floor nurse positions became available due to attrition, they should be offered solely to RNs. Illis testified that Hutchens subsequently informed her that the facility was moving to an all-RN model of health care delivery in order to improve the quality of care and raise standards, and that as LPNs left RNs should be hired to replace them. Although Illis informed Engram, then the director of nursing, that the LPNs would be replaced by RNs through attrition, no one from Respondent's management informed the staff regarding this decision.

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the application process took 4 weeks, and that completion of the prerequisites for the program will take 9 months.

[10] This Survey identified 25 deficiencies, approximately 13 of which are attributable to the operations of the nursing department (including management and physicians).

[11] Hutchens did not testify at the hearing.

[12] This Survey identified six deficiencies, four of which were attributable to nursing department employees, including management and physicians. Two of the six deficiencies were "G" level deficiencies, indicating that they involved actual harm to a patient.

[13] The record does not establish that any LPNs were disciplined as a result of the patient care deficiencies Illis discussed with them between the time that the December 2010 Survey was issued and May 2011, when Manzi made the decision to eliminate the classification.

Dr. Anthony Frisoli, who became Respondent's associate medical director in November 2011, testified that he took that position and began admitting patients to Somerset Valley after Respondent moved to an all-RN model of health care delivery. Dr. Frisoli testified that for many years prior to this change, Respondent's reputation in the community regarding the quality of the nursing care it provided was not very good. Dr. Frisoli testified that in his opinion, given the higher acuity level and comorbidities of patients now receiving sub-acute care at facilities such as Somerset Valley, an ability to perform assessments and develop care plans on an emergency basis at the RNs' credentialed level is necessary in order to provide optimal care.[14] Dr. Frisoli testified that Somerset Medical Center, an acute care facility where he is an attending physician, and Bridgeway Care Center, where he serves as medical director, had both eliminated LPNs from their sub-acute care areas for this reason. However, Dr. Frisoli had no knowledge of Respondent's staffing and the specific work performance of its LPNs or RNs prior to November 2011, when he became associate medical director.

It is undisputed that Respondent did not provide 1199 with notice or the opportunity to bargain prior to its decision to eliminate the LPN classification through attrition and henceforth assign the floor nurse work to RNs. The Union was notified regarding Respondent's decision in November 2011, in the context of the 10(j) proceeding. *Lightner v. Somerset Valley Rehabilitation & Nursing Center*, 2012 WL 1344731 at *3, fn. 7.

G. Evidence Involving Respondent's Alleged Denial of Access to 1199

On January 30, 2012, Milly Silva, 1199's executive vice president for the New Jersey Region, wrote to Grasso and requested access to the bargaining unit members' "work areas" in Respondent's facility, "in order to observe work processes and working conditions, including health and safety conditions." Silva asked that Grasso contact her and schedule a time for 1199 representatives to visit the facility. Elliott testified that 1199 sought access to the facility in order to conduct bargaining surveys regarding the employees' terms and conditions of employment, and in order to formulate bargaining proposals, select a negotiating committee, and otherwise prepare for collective bargaining negotiations. Elliott stated that the Union also wanted to observe the bargaining unit employees at work, to personally observe their work environment and working conditions, and to ensure that there were no outstanding health and safety problems, such as the unavailability of Hoyer lifts which reduce the number of back injuries. Elliott testified that the bargaining unit CNAs had complained that the nursing staff was inadequate to perform all of the tasks which needed to be completed during a shift, and the Union wanted to visit the facility to determine exactly what the employees' job assignments entailed. Elliott testified that 1199 also wanted to determine whether the employees had access adequate supplies in order to perform their jobs. Respondent admitted in its answer that it never responded to Elliott's request, and it is undisputed that Respondent did not provide the Union with access to the facility.

[14] Frisoli testified that changes in medication require a doctor's order, which can be obtained by either an LPN or an RN in the same manner.

III. ANALYSIS AND CONCLUSIONS

A. Respondent Violated Sections 8(a)(1) and (5) of the Act by Eliminating the LPN Classification and Transferring Bargaining Unit Work to Non-Bargaining Unit RNs Without Providing 1199 with Notice and the Opportunity to Bargain

1. The transfer of bargaining unit work

General Counsel argues that the complaint's allegation that Respondent unilaterally transferred bargaining unit work outside of the bargaining unit in violation of Sections 8(a)(1) and (5) of the Act is properly evaluated under *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and the Board's line of cases beginning with *Torrington Industries*, 307 NLRB 809 (1992). These cases generally hold that an employer's decision to subcontract bargaining unit work is a mandatory subject of bargaining where the employer simply substitutes one group of workers for another that performs the same work, without a substantial capital input or change in the nature or type of business. See, e.g., *O.G.S. Technologies, Inc.*, 356 NLRB 642, at p. 644–647 (2011) (subcontracting of bargaining unit die-cutting work to other firms); *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 467469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005) (subcontracting of bargaining unit X-ray technician and respiratory therapy work performed in Respondent hospital); *Torrington Industries, Inc.*, 307 NLRB at 810811. This analysis has also been applied in cases involving the transfer of bargaining unit work to supervisors, managers, and other nonbargaining unit employees, where the work has not been subcontracted. See, e.g., *St. George Warehouse, Inc.*, 341 NLRB 904 (2004), enfd. 420 F.3d 294 (1st Cir. 1005) (replacement of directly employed bargaining unit warehouse employees with temporary agency employees); *Regal Cinemas, Inc.*, 334 NLRB 304, 312–313 (2001), enfd, 317 F.3d 300 (D.C. Cir. 2003) (transfer of bargaining unit projectionist work to non-bargaining unit managers and assistant managers).

General Counsel contends that here Respondent merely substituted nonbargaining unit RNs for the bargaining unit LPNs, and that the RNs thereafter performed the same floor nurse work as had the LPNs, in the employer's facility, without any substantial capital infusion or change in the nature or type of business on Respondent's part. General Counsel further asserts that Respondent's removal of bargaining unit work did not involve a change in the nature, scope, or direction of its enterprise for reasons of profitability, "akin to the decision whether to be in business at all." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667 (1981); see also *O.G.S. Technologies, Inc.*, 356 NLRB 642, at p. 645 (2011). General Counsel therefore argues that Respondent was not relieved of its obligation to provide 1199 with notice and the opportunity to bargain regarding the transfer of work outside of the bargaining unit.

Respondent contends that the appropriate standard for determining whether it was obligated to bargain with 1199 regarding the transfer of bargaining unit work is the balancing test articulated in *Dubuque Packing Co.*, 303 NLRB 386 (1991),

enf. denied in part, 1 F.3d 24 (D.C. Cir. 1993), which involved a relocation of bargaining unit work. Thus, Respondent contends that General Counsel must first establish a prima facie case by showing that Respondent's decision to transfer the work was not accompanied by "a basic change in the nature of the employer's operations." *Dubuque Packing Co.*, 303 NLRB at 391. Respondent may counter by demonstrating that the work performed at the new location "varies significantly" from the work performed at the former site, that the work at the former site was discontinued entirely, or that the relocation of the work involves "a change in the scope and direction of the enterprise." Id. Alternatively, Respondent may defend by establishing that labor costs were not an issue in its decision, or that, in the event labor costs were a factor, the union could not have offered "labor cost concessions" sufficient to alter Respondent's decision. Id. Here, Respondent argues that labor costs were not a factor in its decision to transfer bargaining unit work to non-bargaining unit RNs, and contends that its move to an all-RN model of health care delivery involved a change in the nature, scope, and direction of its business. Respondent therefore asserts that its transfer of floor nurse work from the LPNs to RNs was not a mandatory subject of bargaining.

I find that the allegations at issue here are more appropriately considered using the *Fibreboard Corp.* and *Torrington Industries, Inc.* line of cases, as opposed to the *Dubuque Packing Co.* burden shifting analysis. I find, as argued by General Counsel, that the evidence establishes that Respondent substituted one group of employees, the nonbargaining unit RNs, for another, the bargaining unit LPNs, and that the RNs continued to perform the floor nurse work formerly performed by the LPNs in the same location and manner. In addition, there is no evidence here that bargaining unit work was geographically relocated, as in *Dubuque Packing Co.* 303 NLRB at 391. As a result, the instant case is more appropriately susceptible to the *Fibreboard Corp./Torrington Industries* analysis, and the balancing analysis articulated in *Dubuque Packing* is inapposite. See, e.g., *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB at 467–469 (applying *Fibreboard/Torrington* line of cases to replacement of bargaining unit employees with subcontractor employees who performed work in employer's facility); *St. George Warehouse, Inc.*, 341 NLRB at 904 (transfer of bargaining unit work performed in employer's facility to temporary agency employees analyzed under *Fibreboard/Torrington* standard).

In particular, I concur with General Counsel that the facts at issue here are similar to the scenario addressed in *St. George Warehouse, Inc.*, where bargaining unit employees were effectively replaced through attrition by temporary agency employees, which had been explicitly excluded from the bargaining unit, and ultimately performed the same work in the employer's facility. 341 NLRB at 904, 924. Here Respondent did exactly that, replacing LPNs as they resigned or were discharged with RNs from an agency, and then hiring RNs directly to perform the floor nurse work previously performed by the LPNs on a permanent basis. Eventually the LPNs, a group of employees explicitly included in the certified bargaining unit, had been entirely replaced by RNs, a job classification which had been explicitly excluded. Furthermore, Respondent has not provided any evidence of a substantial capital outlay which accompanied its shift to an all-RN model of health care delivery or, as discussed in further detail below, a change in the nature or type of its business. As a result, I find that Respondent's transfer of bargaining unit work was a mandatory subject of bargaining under the *Fibreboard/Torrington* standard.

Respondent also contends that it was not obligated to bargain with 1199 because the transfer of bargaining unit floor nurse work was effected in conjunction with a change in the nature, scope and direction of its overall enterprise, citing *First National Maintenance Corp. v. NLRB*, 452 U.S. at 677. In *First National Maintenance Corp.*, the Supreme Court held that decisions which affect conditions of employment but involve such a change, "akin to the decision whether to be in business at all," are not ultimately based upon conditions of employment, and are thus not amenable to the collective-bargaining process. 452 U.S. at 677–678, 687.

However, I find that the evidence does not substantiate this contention. The evidence establishes that Respondent is providing the same services, sub-acute and long-term health care, with employees who perform the same patient care tasks with the same equipment and materials. *O.G.S. Technologies, Inc.*, 356 NLRB 642 at p. 645; *Torrington Industries*, 307 NLRB at 810. There is no evidence that Respondent has abandoned a line of business or otherwise made a change in its overall scope of its operations, made a substantial capital commitment, or implemented more sophisticated technologies which have changed the nature of its business. *O.G.S. Technologies, Inc.*, 356 NLRB 642 at p. 645. Respondent's principal contention in this regard is that it is no longer accepting long-term care patients, and is seeking to become a facility which provides sub-acute care only. However, the testimony at the hearing established that Respondent has never had more than a handful of long-term care patients, and that the majority of the patients for which it provided care required sub-acute services. In addition, Respondent's website, as of May 9, 2012, states that it offers "complete clinical programs" in not only sub-acute but also long-term care (GC Exh. 12, p. 1), and a brochure distributed during Illis's tenure as administrator advertises long-term care services as well (R.S. Exh. 13, p. 5). Nor did the elimination of Respondent's wound care program, which involved one attending physician and one LPN, constitute a fundamental change in its business. As a result, the evidence overall establishes that Respondent continues to operate the same facility, providing the same health care services in the same manner that it has for a number of years, to a substantially similar patient population in terms of overall acuity level. The evidence fails to establish a change in the nature, type, scope, or direction of the business under either *Fibreboard/Torrington* or *First National Maintenance* which would exempt the transfer of work from Respondent's obligation to bargain.

Respondent also contends that its transition to an all-RN model of staffing was a change in the nature, scope and direction of its business because it was implemented based upon a concern with reducing rates of readmission to hospitals from which its patients had been referred, pursuant to ongoing regulatory changes. Respondent contends that its replacement of LPNs with RNs was therefore ultimately effected based upon

concerns regarding the quality of care it was able to provide in light of the implementation of new regulations, as opposed to issues involving labor costs. However, the Board has on several occasions found that subcontracting decisions constitute a mandatory subject of bargaining despite employer contentions that the decisions were motivated by concerns unrelated to labor costs, such as the speed of the work performed, the seasonal nature of the business, equipment out of compliance with regulatory standards, or difficulties in obtaining adequate staff.[15] See *O.G.S. Technologies, Inc.*, 356 NLRB 642, at p. 645–646; *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB at 468–469; *Torrington Industries*, 307 NLRB at 810–811.

In addition, Respondent offered no evidence to demonstrate how new protocols being developed to reduce readmission rates would affect the actual day-to-day work performed by its employees, or require the services of RNs, as opposed to LPNs. In fact, Dr. Frisoli's testimony established that, as of the time of the hearing, these new protocols were still in the process of being developed. The testimony at the hearing establishes that RNs are capable of performing three functions that LPNs may not under their respective licensesadministering an "IV push," making a pronouncement of death, and developing a plan of care for the patient based upon a more interpretive as opposed to observational assessment. Dr. Frisoli testified that the RNs' ability to develop a plan of care in emergent situations was most critical to providing a standard of care appropriate to subacute patients, and a significant component of his preference for working with RNs as opposed to LPNs. However, Respondent provided no evidence to substantiate how the RNs' superior assessment capabilities, or their other additional functions, were necessary to the protocols being developed, or to the reduction of readmission rates overall given the daily work of the floor nurses.[16] This is particularly the case because the record establishes that Respondent had always employed RNs in addition to LPNs. As a result, I find that the evidence is insufficient to substantiate Respondent's claim that the effort to reduce hospital readmission rates, and admittedly evolving protocols, required the replacement of Respondent's LPNs with RNs as part of a change in the nature, scope, and direction of Respondent's business. I therefore find that Respondent's transfer of bargaining unit LPN work to nonbargaining unit RNs was a mandatory subject of bargaining, regardless of its purported genesis in quality of care concerns.

For all of the foregoing reasons, the evidence establishes and I find that Respondent's transfer of floor nurse work from bargaining unit LPNs to nonbargaining unit RNs was a mandatory subject of bargaining. As a result, I find that Respondent's failure to provide 1199 with notice and the opportunity to bargain regarding the decision to transfer bargaining unit work violated Sections 8(a)(1) and (5) of the Act.

2. The elimination of the LPN classification

General Counsel contends that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally eliminating the LPN job classification, which is explicitly included in the bargaining unit certified by the Board in its August 26, 2011 Decision. It is well-settled that the unilateral removal of a position which has been explicitly included within the scope of a bargaining unit, either by the parties' consent or the Board's processes, violates Sections 8(a)(1) and (5). *Wackenhut Corp.*, 345 NLRB 850, 852 (2005); *Mt. Sinai Hospital*, 331 NLRB 895 fn. 2 (2000). Respondent argues that it was not obligated to bargain with 1199 regarding the decision to eliminate the LPN classification because the decision was made in May 2011, while Respondent's Objections to the conduct of the election were pending before the Board, and because it has petitioned for review of the Board's August 26, 2011 Decision certifying 1199 as exclusive bargaining representative. However, it is well settled that Respondent's bargaining obligation attached as of the date of the election, September 2, 2010, and was not suspended pending the outcome of subsequent litigation. See, e.g., *Jason Lopez' Planet Earth Landscape*, 358 NLRB 383, at p. 392 (2012); *Alta Vista Regional Hospital*, 357 NLRB 326, at p. 327 (2011), enfd. 697 F.3d 1181 (D.C. Cir. 2012).

Respondent argues that it was relieved of any obligation to bargain with 1199 because its elimination of the LPN classification was motivated by "compelling economic circumstances." *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). Respondent argues that the compelling economic circumstances it faced involved the improvement of patient care and a need to "position itself in the marketplace as an all-subacute facility." However, Respondent offers no substantive evidence to support this contention, only the argument that the purportedly lower standard of care provided by the bargaining unit LPNs could have resulted in regulatory sanctions and penalties, which in turn could have had a detrimental impact on Respondent's overall financial condition. This sort of hypothetical speculation is insufficient to establish that compelling economic circumstances excused Respondent from its obligation to bargain. See *Jason Lopez' Planet Earth Landscape*, 358 NLRB 383, at p. 393 ("self-serving and conclusory statements" insufficient to establish compelling economic circumstances, where record was devoid of evidence "showing extraordinary, unforeseen events occurring that had a major economic effect on the Respondent"). As a result, I find that Respondent's elimination of the bargaining unit LPN classification was a mandatory subject of bargaining, and that by doing so without providing 1199

[15] Respondent relies on two decisions of the United States Court of Appeals for the Third Circuit which criticized the Board's *Fibreboard/Torrington* analysis, and ultimately found that specific subcontracting decisions were not in fact mandatory subjects of bargaining. In *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (1998), and *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240 (1994), the Third Circuit rejected the Board's application of the *Fibreboard/Torrington* analysis, and instead considered whether the employers were motivated by labor cost issues amenable to collective bargaining, or other, entrepreneurial, factors. However, the Board has declined to apply the analysis articulated by the Third Circuit in these cases in favor of the traditional *Fibreboard Corp./Torrington Industries* analysis. See *Overnite Transportation Co.*, 330 NLRB 1275, 1276–1279 (2000), affd. and revd. in part, 248 F.3d 1131 (3rd Cir. 2000). As a result, they are inapposite here

[16] For the reasons discussed in Sec. III(B)(3), below, the evidence does not substantiate Respondent's contention that 30-day readmission rates were in fact reduced as a result of the transfer of floor nurse work from LPNs to RNs.

with notice and the opportunity to bargain, Respondent violated Sections 8(a)(1) and (5) of the Act.

B. Respondent Violated Sections 8(a)(1) and (3) of the Act by Eliminating the LPN Classification and Transferring Bargaining Unit work to Non-Bargaining Unit RNs in Retaliation for its Employees' Union Activity

1. The applicable legal standard

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether a transfer of bargaining unit work violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See, e.g., *Gaetano & Associates*, 344 NLRB 531, 533–534 (2005), enfd. 183 Fed.Appx. 17 (2nd Cir. 2006) (applying *Wright Line* analysis to allegation of retaliatory subcontracting); *St. Vincent Medical Center*, 338 NLRB 888, 892 (2003), enf. denied and remanded, 463 F.3d 909 (9th Cir. 2006). To establish unlawful activity under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employees' union sympathies or activities were a substantial or motivating factor in the employer's decision here the decision to eliminate the LPN classification and transfer the floor nurse work the LPNs performed to nonbargaining unit RNs. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving employee union support or activity, employer knowledge of that activity, and animus against protected employee conduct. *Gaetano & Associates*, 344 NLRB at 533; see also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive may be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employees' union support or activities. *Gaetano & Associates*, 344 NLRB at 533; *St. Vincent Medical Center*, 338 NLRB at 888 fn. 4; *Wright Line*, 251 NLRB at 1089. Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *St. Vincent's Medical Center*, 338 NLRB at 888 fn. 4, 894895; *T&J Trucking Co.*, 316 NLRB 771 (1995). When General Counsel presents a strong *prima facie* showing of discrimination, Respondent's burden in this regard is "substantial." *Vemco, Inc.*, 304 NLRB 911, 912 (1991).

2. General Counsel has established a prima facie case

General Counsel has established a prima facie case that Respondent eliminated the LPN classification, and transferred the bargaining floor nurse unit work previously performed by LPNs to nonbargaining unit RNs, in retaliation for the LPNs' union activities. The evidence establishes that Respondent was aware, beginning at the very least with the filing of the petition for a representation election on July 22, 2010, that its employees were engaged in union activity. In particular, the three principal employee advocates for 1199 discharged by RespondentSheena Claudio, Shannon Napolitano, and Jillian Jacqueswere LPNs. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 674, 675, 676, 687. As discussed above, significant litigation regarding the election, certification and Respondent's unfair labor practices has followed. In addition, at the time that the LPNs' work was transferred, and the position eliminated, General Counsel and Respondent were involved in an ongoing proceeding for injunctive relief under Section 10(j) to reinstate the three LPNs. As a result, Respondent's knowledge of the LPNs' union activities at the time their work was transferred and the classification eliminated is indisputable.

The Board's findings in the previous case evince Respondent's animus toward the union activities of its employees, and the union activities of the LPNs in particular. See, e.g., *St. George Warehouse*, 349 NLRB 870, 878 (2007) (relying on previous Board decision finding violations of Sections 8(a)(1) and (3) as evidence of animus); *Wallace International de Puerto Rico*, 324 NLRB 1046fn. 1 (1997) (same). As discussed above, the Board explicitly affirmed Judge Davis's conclusion that Respondent's antiunion animus was "beyond question," as well as his findings that Respondent committed multiple violations of Sections 8(a)(1) and (3), including unlawful discharges, discipline, reduction of employee hours, interrogations and solicitation of employee complaints and grievances, which took place in the fall of 2010. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1361. The evidence in that case also establishes that Hutchens, who was involved in the determination to eliminate the LPN classification and transfer work, personally committed violations of Section 8(a)(1), instructing managers to obtain information as to how they believed the employees under their supervision would vote, requiring that managers provide a basis for their predictions, and soliciting employee grievances, promising increased benefits and improved terms and conditions of employment. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 685, 686. In addition, the Board found that Illis, the Administrator at the time of the decision at issue here, repeatedly interrogated an employee, accelerated the employee's resignation, unlawfully solicited employee grievances, and subjected employees to increased disciplinary scrutiny. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 688, 690, 691. Illis was also directly involved in unlawful written discipline, and asked a supervisor to prepare a list of potential per diem employees who would vote against the Union if a new election were held. Id. As a result, the evidence is more than sufficient to demonstrate Respondent's animus against the employees' union activity, and the active participation by Hutchens and Illis in unlawful conduct designed to thwart it.

I further find that the timing of Respondent's transfer of bargaining unit LPN work militates substantially in favor of a

finding that Respondent's decision was unlawfully motivated. *See St. Vincent Medical Center*, 338 NLRB at 893 (considering the timing of employer's subcontracting in order to determine unlawful motivation). The administrative hearing before Judge Davis opened on April 27, 2011, and the Regional Director's petition for injunctive relief pursuant to Section 10(j), including the interim reinstatement of the three LPNs that were 1199's principal employee advocates, was filed at around that time. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1364; *Lightner v. Somerset Valley Rehabilitation and Nursing Center*, 2012 WL 1344731. Manzi testified that she made the decision to eliminate the LPN classification, and transfer the work previously performed by the LPNs to RNs by attrition, in May 2011, only weeks afterward. Such timing is evidence of unlawful motivation. *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), at p. 310–311 (timing of discipline imposed two months after employer learned of protected activities and two weeks after representation election suspect); *St. Vincent Medical Center*, 338 NLRB at 893 (subcontracting of bargaining unit work 3 weeks after representation election "suspicious"). In addition, the administrative proceeding continued throughout the summer of 2011. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1364. However, the evidence establishes that it was not until November 2011, in the context of the 10(j) proceeding, that Respondent informed the General Counsel and 1199 that it had in fact eliminated the LPN position and transferred by attrition the floor nurse work formerly performed by the LPNs to RNs explicitly excluded from the bargaining unit. This sequence of events, together with the evidence of animus discussed above, is sufficient to generate the inference that Respondent transferred the work of the LPNs to RNs in retaliation for the LPNs' union activity, and in order to avoid reinstating them should the General Counsel obtain an order in the 10(j) proceeding requiring that it do so.

For all of the foregoing reasons, I find that General Counsel has established a strong prima facie case that Respondent eliminated the LPN classification and transferred bargaining unit work to nonbargaining unit RNs in retaliation for the union activities of the LPNs who had previously performed it.

3. The preponderance of the evidence does not support Respondent's contention that it would have transferred bargaining unit work in the absence of the employees' union activity

Respondent contends that it transferred the bargaining unit floor nurse work formerly performed by the LPNs to RNs as part of an effort to offer a unique service in comparison to competitor facilities by providing solely sub-acute care. Respondent claims that RNs' higher level of education and credentialing, and ability to perform a more extensive assessment and develop a plan of care, made them a more appropriate classification for a population consisting solely of sub-acute patients. Respondent also asserts that it eliminated its LPNs and transferred their work in response to the results of NJDHSS Surveys conducted in December 2009 and 2010. Respondent argues that the deficiencies revealed by these surveys led it to conclude that the acuity level of its patients was too intense for LPNs, as opposed to RNs, to provide adequate care. I find that the preponderance of the record evidence ultimately does not substantiate these claims. Respondent presented evidence that RNs have more extensive education, and are permitted to perform more sophisticated evaluations of patient status and a wider range of procedures than LPNs. Respondent also presented evidence of a general trend, at least in the acute care setting, toward employing solely RNs. However, the preponderance of the evidence overall does not ultimately support Respondent's contention that it made the specific determination in May 2011 to eliminate the LPN classification at Somerset Valley, and transfer the bargaining unit floor nurse work to RNs, as a result of those general factors.

The evidence, as discussed in Section III(A)(1), above, does not substantiate Respondent's assertion that it eliminated the LPN classification and transferred the work to nonbargaining unit RNs because it ceased to provide long-term care, creating an exclusively sub-acute patient population. The evidence establishes that both before and after the elimination of the LPN position and transfer of work, Respondent provided care to a population of predominantly sub-acute patients, with a few long-term patients who had resided at the facility for a number of years. There is simply no evidence of any change in Respondent's patient population, let alone the sort of dramatic change which would establish that it eliminated the LPN position and transferred the work outside the bargaining unit for legitimate, nondiscriminatory reasons. Respondent's claim that it eliminated the LPNs and transferred their work because of a change in the overall acuity level of its patient population is therefore not supported by the record. In addition, although Respondent contends that it no longer accepts long-term care patients, a brochure advertising such services was disseminated during Illis' tenure as Administrator, and as of May 2012, its website indicated that it provided long-term as well as sub-acute care.

Respondent also argues that its elimination of the LPN position and transfer of the work to RNs was consonant with broader trends in patient care delivery emphasizing a preference for RNs, given their education and the scope of their licensure, particularly in acute care facilities. For example, Respondent's associate medical director, Dr. Anthony Frisoli, testified that in his experience and opinion RNs can more reliably provide a higher standard of care overall, regardless of their individual experience.[17] Dr. Frisoli testified that the general trend in health care delivery, particularly in acute care facilities, is to maintain a nursing staff consisting solely of RNs. Respondent also notes that Kathleen Martin, who was called by General Counsel as an expert witness in the areas of long-term care nursing administration, nursing practices, and State survey requirements, testified during the 10(j) proceeding that given their additional education, a staff consisting of solely RNs would be optimal, all else being equal, for patient care standards.[18] R.S. Exh. 21, p. 52, 201–204. However, regardless of

[17] I note that opinions on this issue vary, as Dr. Buch testified that he considers the specific degree and license held by a particular nurse to be less important than their actual experience in terms of their overall competence.

[18] I note that during her testimony Ms. Martin emphasized that she was basing this opinion on an assumption that the facility employs the same number of RNs as they would have employed LPNs, and stated

the general evidence regarding overall trends in health care delivery involving RNs and LPNs, the preponderance of the record evidence does not establish that Respondent made the specific decision in May 2011 to eliminate the LPN position and transfer the floor nurse work performed by the LPNs formerly employed to nonbargaining unit RNs for that reason. Instead, the timing of the decision in the context of the litigation following the Union's organizing campaign and certification, and the animus with which Respondent targeted the LPNs as found by the Board, strongly indicates that Respondent's decision in May 2011, was made for unlawful, retaliatory reasons.

Given this background, the specific evidence Respondent presented regarding its decision-making process is inadequate to establish that Respondent legitimately concluded in May 2011 that LPNs were incapable of competently providing care to the acuity level of its patient population. For example, Manzi initially testified that she made the decision to eliminate the LPN classification because of the facility's transition to a population of solely sub-acute patients, a transition which the evidence does not establish actually occurred. Although Manzi then testified that she and Hutchens also decided that LPNs could not provide adequate care for Respondent's patient population based upon the results of the NJDHSS December 2010 Survey, this rationale was elicited after a specific suggestion by Respondent's counsel (Tr. 541). Indeed, in the previous case Hutchens apparently testified that "it was 'common' for a facility to be cited for deficiencies in a survey," which contradicts Respondent's argument that it decided to implement a significant reconfiguration of its employee complement on that basis. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1367. In addition, the 2010 Survey, while containing more citations than the 2009 Survey overall, did not contain any citations at the "G" level, which denotes a situation involving actual harm to a patient. In any event, if the December 2010 survey formed the basis for Hutchens and Manzi's decision to replace the LPNs with RNs, no explanation was provided as to why Manzi waited five months to do so, given the purported gravity of the situation.

Illis's testimony regarding her assessment of the LPNs' work performance and the standard of care being provided only complicates the scenario further. Manzi testified that all of the information she relied on to conclude that the LPNs should be replaced with RNs was provided by Hutchens, who told her that despite teaching and training provided to the LPNs, certain care delivery systems such as medication administration were not "sustainable." In the absence of any evidence to the contrary, it is reasonable to assume that Hutchens obtained whatever information he used to determine that LPNs were fundamentally inadequate and required wholesale replacement from Illis, who testified that as Administrator she reported to him directly and spoke to him every week. Illis also testified, however, that she first reached the conclusion that LPNs were not capable of adequately providing care to Respondent's patient population given its overall acuity level 1 to 2 months after becoming Respondent's administrator in August 2010. Illis testified that she formed her opinion based upon the results of the December 2009 NJDHSS Survey, and that she probably communicated this conclusion to Hutchens immediately after she reached it. However, for reasons unexplained by Manzi or any of Respondent's other witnesses, the determination to replace LPNs with RNs was not made for another 7 months. Given what Respondent contends is the severity of the issue in terms of its regulatory status and financial situation, its unexplained delay in addressing what it contends was the wholesale inadequacy of the LPNs as a classification militates against a finding that its asserted reason for replacing them with RNs was legitimate.[19]

The record also does not substantiate Illis' testimony, and Hutchens' assertion (according to Manzi), that the LPNs received additional training, education, and discipline in an attempt to raise the standard of care prior to Respondent's ultimate decision that LPNs simply could not cope with the acuity level of its patient population. The evidence establishes that the sole training and education the LPNs received after the NJDHSS December 2010 Survey was a series of meetings Illis conducted with the nursing staff to discuss the agency's findings. The record establishes that this was the only training or education provided to the LPNs between the December 2010 Survey, supposedly the impetus for Manzi and Hutchens' conclusion that LPNs were incapable of providing adequate care for a sub-acute patient population, and Respondent's eliminating the entire classification. Illis contended in her testimony that she decided to implement educational and disciplinary measures after the December 2009 Survey indicated that the LPNs were incapable of providing patient care to an adequate standard. However, the Board found in the previous case that Respondent increased its scrutiny of the employees' work performance only in response to the representation election in September 2010, and not immediately after the December 2009 Survey or in response to the citations the NJDHSS issued. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361 at p. 1362–1363, 688–689. In fact, it appears from the Board's previous decision that a significant amount of the disciplinary action taken by Respondent against the LPNs during the period August 2010 through May 2011 was imposed for unlawful, retaliatory reasons.[20] *Somerset Valley Rehabilitation*

that this was unlikely for budgetary reasons, given the higher compensation required for RNs. R.S. Exh. 21, p. 203.

[19] I also do not find the material contained in 2011 Objectives form, dated June 25, 2011, to be probative in this regard. The 2011 Objectives form indicates that the level of acute discharges at that time was engendered by a "lack of RNs on all shifts to do comprehensive assessments," and that problems with "Level One Basic Requirements/Center Level Certification" were caused by the need for an "Acuity Based Staffing Model." However, Illis testified that Engram, who was the administrator at that time, completed the 2011 Objectives form, and Engram did not testify at the hearing. Illis testified that she did not know what Engram meant specifically by her statement that there was a lack of RNs on all shifts to do comprehensive assessments, nor did she know what was meant by "Level One Basic Requirements/Center Level Certification." As a result, I find that the responses contained in the 2011 Objectives form have little probative value.

[20] The Board's decision indicates that Respondent legitimately issued a written warning issued to LPN Sheena Claudio for a medication error in September 2010. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1361, fn. 3. Judge Davis' decision also

and Nursing Center, 358 NLRB 1361 at p. 1361–1364, and at p. 1361, fn. 3. All of this evidence undermines Respondent's contention that it eliminated the LPN classification and transferred the work performed to non-bargaining unit RNs based upon legitimate, non-discriminatory concerns regarding quality of care.

Nor does the record contain any evidence that Manzi, Hutchens, or Illis considered factors, other than the purported inadequacy of the LPNs, in evaluating the problems revealed by the NJDHSS Survey citations. For example, there is no evidence that Respondent discussed or considered whether the near-continuous turnover in Nursing Department management—the positions of DON, ADON, and unit manager—contributed to the standard of care the Department's employees were able to provide. Indeed, Hutchens testified in the previous case that former Administrator Elizabeth Heedles was replaced by Illis in August 2010 due to his "concerns" regarding Heedles' "administrative abilities," as evinced by inadequate staff to resident ratios attributable to her "struggling" to staff and schedule the facility.[21] *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1367. Although Illis and Dr. Frisoli testified that the incessant managerial turnover in the Nursing Department could have affected the quality of the nursing care provided, there is no evidence that Respondent considered this factor at all. Similarly, although Illis admitted during her testimony that there were problems with the work performance of both LPNs and RNs which the NJDHSS surveys documented, there is no evidence as to why Respondent focused on the LPNs, as opposed to RNs, as the ultimate source of the problem. Illis also admitted that Respondent had not fully implemented other programs designed by CareOne Management and/or Healthbridge Management in order to improve quality of care and reduce readmission rates, such as 72-hour care plan meetings and Interact II.[22] In fact, during her testimony Kristina Grasso attributed a purported improvement in readmission rates in January 2012 to additional in-service training in the Acute Transfer Alternative program, or ATAP. Finally, despite the critical nature of the problems allegedly caused by the LPNs' inability to provide care at the acuity level required and her weekly conversations with Hutchens, Manzi testified that she had no knowledge as to whether the RNs who replaced the LPNs as floor nurses had received discipline based upon work performance issues. Indeed, Manzi admitted that she never even inquired as to whether the RNs at Somerset Valley were performing at a higher level overall than had the LPNs.

And in fact, the evidence does not establish that this was the case. Respondent's witnesses testified primarily regarding differences in the education, training, and licensure of RNs, as opposed to their actual work performance at Respondent's facility. Dr. Frisoli's testimony regarding his overall preference for working with RNs for example, was articulated in that manner. As a result, I credit Mangal and D'Ovidio's testimony that some of the RNs which replaced the LPNs at Respondent's facility, both those initially referred from an agency beginning in the spring of 2011 and those hired to replace the agency RNs as employees, had to be shown how to begin IVs, administer dialysis, perform pleural evacuation and tracheostomy suctioning, and perform wound care. Indeed, the evidence demonstrates that the only one of the initial employee RNs still employed by Respondent is suspended and on a final warning for permitting a patient to leave the facility in order to smoke a cigarette, and has committed eight medication errors. I also credit the testimony of Dr. Buch that wound care deteriorated after D'Ovidio was replaced with nurses who did not share her expertise, and that eventually his wound care patients were assigned nurses who had no clinical experience with major wounds or dressings at all. I further credit Dr. Buch's testimony that he ended his association with Respondent, and no longer refers patients there, as a result. Furthermore, the December 2011 NJHSS Survey, while significantly improved over the December 2010 Survey, contains as many citations attributable to the operations of Respondent's Nursing Department as did the December 2009 survey, when the majority of the patient care was provided by LPNs (although none of the December 2011 citations involve actual patient harm). Indeed, the December 2011 survey found deficiencies in specific areas, such as assessments of functional capacity and patient needs, development of comprehensive care plans, and adequate care standards, which Respondent contends the replacement of LPNs with RNs was intended to improve given the scope of the RNs' licensure. The evidence therefore does not substantiate Respondent's contention that RNs necessarily perform at a higher level, and that an all-RN model substantially improved the standard of care provided, in the context of Respondent's particular facility and patient population.

Nor did Respondent present probative evidence establishing that 30-day hospital readmission rates from its facility, purportedly a critical issue given impending regulatory changes, improved after Respondent replaced the LPN floor nurses with RNs. Kristina Grasso, Respondent's administrator since Illis left the facility in August 2011, testified that since January 2012 readmission rates had been "on the decline," and that what Respondent refers to as the "acute discharge rate" was the lowest in April 2012, that it had been in over a year. I do not, however, find this testimony to have much probative value, given the documentary evidence Respondent attempted to introduce in order to corroborate it. This consisted of what

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indicates that Respondent also disciplined another "nurse," Doreen Dande, for a similar medication administration error, but it is not clear whether Dande was an LPN or an RN, or when Dande was disciplined. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1375, 689. The record in the instant case establishes that D'Ovidio received a verbal warning in the early spring of 2011 for failing to timely provide a daily summary of treatments administered to wound patients; the General Counsel does not allege that this warning was issued for retaliatory reasons.

[21] Respondent's then-DON, Kamala Kovacs, was dismissed at this time as well. *Somerset Valley Rehabilitation & Nursing Center*, 358 NLRB 1361, at p. 1367.

[22] According to Illis, 72-hour care plan meetings were supposed to take place in order to formulate the initial care plan for every patient admitted, but were not being held on a consistent basis. Interact II was a program intended to monitor a patient's condition and assessment, which provided education to nurses regarding effective communication with physicians when a patient's condition changed. Although Interact II was to have been implemented in the spring of 2011, according to Illis it was delayed.

Grasso described as a tabulation of the number of acute discharges per month, divided by Respondent's average patient census for that same month. However, Grasso testified that the "acute discharges per month" figure included *all* patients who were admitted to an acute care facility, and was not limited to patients readmitted within 30 days of their arrival at Somerset Valley. Ultimately, the documentary evidence purporting to be an accurate calculation of readmission rates was withdrawn, and Grasso provided no other basis for her testimony regarding changes in readmission rates overall. Finally, as discussed above, during her testimony Grasso attributed the reduction in readmission rates since January 2012 to additional training provided in the ATAP program, and not to the replacement of LPNs with RNs. As a result, I do not find Grasso's testimony probative on the issue of changes in readmission rates, and the cause of any such fluctuation, after Respondent eliminated the LPN classification and transferred the floor nurse work to RNs.[23]

Finally, Respondent stipulated at the hearing that Somerset Valley is the only one of the New Jersey facilities managed by CareOne Management or Healthbridge Management to have eliminated LPNs and implemented a model where nursing care is provided solely by RNs. The evidence establishes that Healthbridge Management and CareOne Management operate approximately 28 facilities in New Jersey, a number of which provide subacute care. All of these facilities would face the same issues regarding quality of care engendered by the impending financial penalties to be imposed upon hospitals which readmit patients within 30 days. As a result, the ATAP program and the monitoring of acute transfers conducted by Healthbridge Management and/or CareOne Management were not measures restricted in their application to Respondent alone. Despite this, the record establishes that an all-RN model of health care delivery was not implemented at any other Healthbridge Management or CareOne Management facility in New Jersey, regardless of whether subacute or long-term care was being provided. Although Manzi, who made the determination to implement an all-RN model of care at Somerset Valley, has been the executive vice president of operations for both Healthbridge Management and CareOne Management since January 2011, with overall responsibility for all of the companies' New Jersey facilities, she did not address this discrepancy in any way during her testimony, and Respondent provided no other evidence to explain it. Overall, this evidence militates in favor of a finding that Respondent's asserted reasons for eliminating the LPN classification and transferring the work to nonbargaining unit RNs are pretextual. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 901, 910–911 (2000), enfd. 2001 WL 791645 (4th Cir.), enfd. in relevant part on rehearing 24 Fed.Appx. 104 (4th Cir. 2001) (considering treatment of employees at other facilities in order to determine whether employer unlawfully withheld wage increase at facility where employees engaged in union activities).

[23] For the reasons discussed in fn. 19, above, I also do not find the material contained in the "2011 Objectives" form completed by Engram to be probative on this issue.

For all of the foregoing reasons, the preponderance of the evidence does not substantiate Respondent's defense that it eliminated the LPN position and transferred the floor nurse work formerly performed by the LPNs to nonbargaining unit RNs due to a change in market positioning, patient population, or quality of care issues. As a result, I find that Respondent has not rebutted General Counsel's prima facie case, and that Respondent eliminated the LPN classification and transferred work to RNs in retaliation for the LPNs' union support and activities, in violation of Sections 8(a)(1) and (3) of the Act.

C. Respondent Violated Sections 8(a)(1), (3), and (5) of the Act by Discharging Mangal and D'Ovidio as Part of its Unlawful Elimination of the LPN Classification and Transfer of Bargaining Unit Work to RNs

The evidence establishes that Mangal and D'Ovidio were discharged by Respondent as part of its unlawful elimination of the LPN classification and transfer of bargaining unit floor nurse work to RNs. I credit D'Ovidio's testimony that on August 18, 2011, she was discharged by Illis, who informed her that the facility was moving in a different direction and that D'Ovidio "wasn't part of the plan." I find it reasonable to infer that Illis's remarks referred to the elimination of the LPN position, and transfer of work to the RNs, which had been ongoing throughout the summer. I further credit Mangal's testimony that on October 17, 2011, Grasso discharged her, telling her that she could not establish that she was enrolled in an RN Program. Mangal's testimony in this respect was consistent with a Termination Personnel Action Form signed by Grasso, which gave that same reason for her discharge. Respondent provided no evidence to establish that Mangal and D'Ovidio were discharged for any reason other than their being LPNs, as opposed to RNs. As a result, I find that their discharges were engendered by Respondent's unlawful elimination of the LPN position, and transfer of bargaining unit floor nurse work to nonbargaining unit RNs. Their discharges therefore violated Sections 8(a)(1), (3) and (5) of the Act.[24] See, e.g., *Alta Vista Regional Hospital*, 357 NLRB 326 at p. 326–327 (employer violated Sections 8(a)(1) and (5) by discharging employee pursuant to unlawful unilateral changes in Fit Test practice); *Aldworth Co.*, 338 NLRB 137, 144–145 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004) (employer violated Sections 8(a)(1) and

[24] Respondent also contends that the charge alleging that D'Ovidio's discharge violated Sec. 8(a)(3) of the Act is time barred. Respondent argues that while D'Ovidio was discharged on August 18, 2011, an unfair labor practice charge specifically alleging that her discharge violated Sec. 8(a)(3) was not filed until April 3, 2012, and that therefore the allegation is precluded by Sec. 10(b). However, I find that the allegation that D'Ovidio was discharged in violation of Sec. 8(a)(3) is closely related to the timely filed allegation that Respondent violated Sec. 8(a)(3) by eliminating the LPN classification and transferring bargaining unit floor nurse work to RNs in retaliation for the LPNs' union activity. Both allegations involve the same legal theory, the same fact situation or sequence of events, and involve the same or similar defenses. See *Carney Hospital*, 350 NLRB 627, 628 (2007), application dismissed 2008 WL 2223220 (D.C. Cir. 2008), citing *Redd-I, Inc.*, 290 NLRB 1115 (1988). Respondent's motion to dismiss the allegation that D'Ovidio was discharged in violation of Sec. 8(a)(3) is therefore denied.

(3) by discharging employees for violation of Selection Accuracy Policy altered for retaliatory reasons).

D. Respondent Violated Sections 8(a)(1) and (5) of the Act by Denying the Union Access to its Facility

General Counsel contends that Respondent violated Sections 8(a)(1) and (5) of the Act by denying the Union's request for access to the Somerset Valley facility. The evidence establishes that on January 30, 2012, Union Executive Vice president Milly Silva wrote to Grasso requesting access to the bargaining unit's work areas in the facility, to "observe work processes and working conditions, including health and safety conditions." It is undisputed that Respondent did not provide the Union with access to the facility.

The Board applies a balancing test to determine whether a union is entitled to access to an employer's facility in order to perform its representative functions. In *Holyoke Water Power Co.*, the Board held that when "responsible representation" can only be accomplished through access to the employer's premises, the employer's property rights "must yield to the extent necessary to achieve this end." 273 NLRB 1369, 1370, enfd. 778 F.2d 49 (1st Cir. 1985). However, when the union can effectively represent the bargaining union members "through some alternate means other than entering on the employer's premises," the employer's property rights are paramount, and the union may be lawfully denied access. *Holyoke Water Power Co.*, 273 NLRB at 1370; see also *Nestle Purina Petcare Co.*, 347 NLRB 891 (2006); *New Surfside Nursing Home*, 330 NLRB 1146, 1146 fn. 1, 1150 (2000). It is the employer's burden to present evidence establishing that its property rights predominate over the union's right to reasonable access, and to demonstrate there are alternate means of obtaining the information necessary for the union to adequately represent the bargaining unit employees. *Nestle Purina Petcare Co.*, 347 NLRB at 891; *New Surfside Nursing Home*, 330 NLRB at 1150; see also *New Surfside Nursing Home*, 322 NLRB 531, 535 (1996).

Here, the information sought by the Union – direct interaction with the employees and observation of their work areas, working conditions, and work processes – was presumptively relevant to its responsibilities as a collective-bargaining representative. *New Surfside Nursing Home*, 330 NLRB at 1150. The Board has stated that in the context of collective bargaining negotiations,

> There can be no adequate substitute for the Union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy.

CCE, Inc., 318 NLRB 977, 978 (1995). The Board has held that these considerations are particularly acute in the case of bargaining for an initial contract by a newly certified union. *CCE, Inc.*, 318 NLRB at 978, 979; see also *Washington Beef, Inc.*, 328 NLRB 612, 618–619 (1999). As a result, I find that General Counsel has met its burden to establish that the information sought by the Union was presumptively relevant to its representation of the bargaining unit employees.

The evidence does not establish that, as Respondent argues, the Union had alternative means at its disposal to obtain the information it sought by visiting Respondent's premises. Respondent contends that Elliott admitted during his testimony that he could obtain the information necessary to prepare for collective bargaining by speaking with the employees, as opposed to visiting the facility. However, Elliott made clear during his testimony that simply discussing the employees' terms and conditions of employment with them was not an adequate substitute for actually observing their workplace and work activities (Tr. 99–100). This would be particularly true in the context of negotiations for an initial collective-bargaining agreement, where the union has no prior experience with the employer's facility and practices, and the employees are relatively unlikely to have experience with collective bargaining negotiations. As a result, I find that Respondent has not met its burden to demonstrate that the Union had adequate alternative means of obtaining the information, other than access to the facility.

For the foregoing reasons, I find that Respondent violated Sections 8(a)(1) and (5) of the Act by denying the Union's January 30, 2012 request for access to its facility.

CONCLUSIONS OF LAW

1. The Respondent, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since August 26, 2011, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees consisting of the following:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

4. By eliminating the licensed practical nurse job classification and transferring bargaining unit work formerly performed by the license practical nurses to nonbargaining unit registered nurses without providing the Union with notice and the opportunity to bargain, Respondent violated Sections 8(a)(1) and (5) of the Act.

5. By eliminating the licensed practical nurse job classification and transferring bargaining unit work to registered nurses

in retaliation for the employees' activities on behalf of the Union, Respondent violated Sections 8(a)(1) and (3) of the Act.

6. By discharging Irene D'Ovidio and Maharanie Mangal as part of its unlawful unilateral and retaliatory elimination of the licensed practical nurse job classification and transfer of bargaining unit work to registered nurses, Respondent violated Sections 8(a)(1), (3), and (5) of the Act.

7. By refusing to provide the Union with access to its Bound Brook, New Jersey facility in order to inspect the bargaining unit employees' work processes and working conditions, including health and safety conditions, Respondent violated Sections 8(a)(1) and (5) of the Act.

8. The above-described unfair labor practices affect commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Sections 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having found that Respondent violated the Act by unilaterally eliminating the bargaining unit LPN classification and transferring the work formerly performed by the LPNs to nonbargaining unit RNs, Respondent shall be ordered to rescind these unilateral changes and bargain with the Union regarding any changes in the wages, hours, working conditions, and other terms and conditions of employment for the bargaining unit employees. Respondent shall further be ordered to restore the status quo ante existing prior to its unfair labor practices, by restoring the LPN classification as it existed prior to May 2011, and by returning the work transferred to the non-bargaining unit RNs to the LPN classification in the manner that it existed prior to May 2011. Respondent shall be ordered to reinstate Irene D'Ovidio and Maharanie Mangal to their former or substantially equivalent positions, dismissing, if necessary, any employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed. Respondent shall further be ordered to make Irene D'Ovidio and Maharanie Mangal whole for any loss of earnings they may have suffered as a result of its unlawful conduct, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds, 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate D'Ovidio and Mangal for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award covering periods longer than one year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). I shall further order Respondent to provide access to its Bound Brook, New Jersey facility to a representative of the Union for a reasonable period of time to obtain information regarding the bargaining unit employees' work processes and working conditions, including health and safety conditions. Finally, Respondent shall be ordered to post a notice informing its employees of its obligations herein.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[25]

ORDER

Respondent 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center, Bound Brook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union, as the exclusive collective-bargaining representative of the bargaining unit employees, by unilaterally eliminating classifications contained in the bargaining unit, and transferring the work formerly performed by employees in such classifications to nonbargaining unit employees.

(b) Eliminating classifications contained in the bargaining unit, and transferring the work formerly performed by employees in such classifications to nonbargaining unit employees, in retaliation for the bargaining unit employees' union activities.

(c) Refusing to provide the Union with access to its Bound Brook, New Jersey facility to obtain information regarding the bargaining unit employees' work processes and working conditions, including health and safety conditions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the unilateral changes made with respect to the elimination of the LPN classification and transfer of bargaining unit work formerly performed by the LPNs to nonbargaining unit RNs

(b) On the request of the Union, bargain collectively and in good faith regarding any decision to eliminate the LPN classification and transfer of bargaining unit work formerly performed by the LPNs to nonbargaining unit employees.

(c) On the request of the Union, grant access to the Bound Brook, New Jersey facility to a representative designated by the Union for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe the work process and working conditions, including health and safety conditions, of the bargaining unit employees.

(d) Within 14 days from the date of this Order, offer immediate and full reinstatement to Irene D'Ovidio and Maharanie Mangal to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or to other rights and privileges they previously enjoyed.

(e) Make whole with interest Irene D'Ovidio and Maharanie Mangal for any lost wages they may have suffered as a result of the above-described unlawful unilateral and retaliatory changes, in the manner set forth in the remedy section of this decision.

[25] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Within 14 days of the date of this Order, remove from all files any reference to the discharges of Irene D'Ovidio and Maharanie Mangal on August 18, 2001, and October 17, 2011, respectively, and within 3 days thereafter, notify D'Ovidio and Mangal in writing that this has been done and that the discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(h) Within 14 days after service by the Region, post at the facility at Bound Brook, New Jersey, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2011.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC January 15, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT eliminate bargaining unit job classifications and transfer the work formerly performed by employees in those job classifications to nonbargaining unit employees without providing 1199 SEIU United Healthcare Workers East, New Jersey Region, with notice and the opportunity to bargain.

WE WILL NOT eliminate bargaining unit job classifications and transfer the work formerly performed by employees in those job classifications to nonbargaining unit employees in retaliation for the employees' union activities.

WE WILL NOT refuse to bargain with 1199 SEIU United Healthcare Workers East, New Jersey Region by refusing to grant the Union's request for access by the Union's representatives to our Bound Brook, New Jersey facility

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL on request of the Union, restore to our bargaining unit employees all terms and conditions of employment existing prior to May 2011, including restoring the LPN job classification and returning to the LPNs the work transferred beginning in May 2011 from the LPNs to nonbargaining unit RNs.

WE WILL on request of the Union bargain in good faith with the Union, as the exclusive representative of our employees in the following unit, regarding any decision to eliminate bargaining unit job classifications and transfer bargaining unit work formerly performed by bargaining unit employees to nonbargaining unit employees:

> All full-time and regular part-time and per diem nonprofessional employees including licensed practical nurses, certified nursing assistants, housekeepers, rehabilitation technicians, dietary cooks, dietary aides, laundry aides, recreation assistants, unit secretaries, medical records coordinators, maintenance workers, porters and receptionists employed by the Employer at its Bound Brook, New Jersey location, but excluding all office clerical employees, registered nurses, dieticians, physical therapists, physical therapy assistants, occupational therapists, occupational therapy assistants, speech therapists, social workers, staffing coordinators, payroll/benefits coordinators, all other professional employees, guards and supervisors as defined in the Act.

WE WILL, on request, grant access to our Bound Brook, New Jersey facility to a representative designated by the Union for reasonable periods and at reasonable times, sufficient to allow the Union's representative to observe the work processes and working conditions, including health and safety conditions, of the bargaining unit employees.

WE WILL within 14 days of the date of the Board's Order, offer Irene D'Ovidio and Maharanie Mangal full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Irene D'Ovidio and Maharanic Mangal whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest compounded daily

WE WILL file a report with the Social Security Administrative allocating backpay to the appropriate calendar quarters.

WE WILL compensate Irene D'Ovidio and Maharanie Mangal for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than one year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Irene D'Ovidio and Maharanie Mangal, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

1621 ROUTE 22 WEST OPERATING COMPANY, LLC D/B/A SOMERSET VALLEY REHABILITATION & NURSING CENTER